



# NATIVE HAWAIIAN LEGAL CORPORATION

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**LATE**

Chair Luke and members of the Finance Committee,

**RE: SB 1171 SD1 (2 p.m. agenda)**

Senate Bill 1171 HD1 would allow fundamental land use decisions to be made **before** agencies are given all the necessary information they need to make an informed decision on the impact a project may have on important historic resources. It would also confer unfettered discretion upon the State Historic Preservation Division, a division with a blemished record.

When agencies approve projects **before** necessary studies are completed on the historic properties that may be affected, the result is construction delays, cost over-runs, and the desecration of iwi and/or other important historic resources. The failure to prepare an archaeological inventory survey (AIS) prior to decision-making led to the unnecessary disturbance of over sixty burials at each of these projects: the Wal-Mart on Ke`eaumoku Street, General Growth's Ward Village Shops Project and Kawaiaha`o Church's multi-purpose center project.

When burial sites and other historic property are not identified before fundamental decisions are made, many options that could protect those sites are foreclosed (including the project's scope, size, location and design) When burials are identified later in the process, it often becomes very difficult for adjustments to be made, particularly when large sums of money have already been outlaid to forward construction plans that do not account for or appropriately anticipate the locations or numbers of burials within a project area. For example, General Growth insisted that burials could not be preserved in place and had to be relocated because its construction plans did "not allow for a lot of redesign" and it had already "spent \$18-20 million" that it could not recover (September 13, 2006 minutes of the O`ahu Island Burial Council at 5-6).

If an EIS can be prepared before decisions are made, there is no reason that an AIS cannot be completed as well. In fact, an AIS was prepared for a 10 mile long, 600 acre area for the Saddle Road. In the words of the Hawai'i Supreme Court allowing decisions to be made prior to historic properties being identified would "turn the process upside down." *Kaleikini v. Yoshioka*, 128 Hawai'i 53, 77 (2012).

Please consider SHPD's track-record. It has allowed hundreds of burials to be desecrated despite the plain meaning and intent of HRS chapter 6E. The National Park Service issued a scathing audit expressing a lack of confidence in the current management and operations of SHPD. The federal agency concluded: "Copies of SHPD letter responses and comments shared by federal agencies and outside groups illustrate that some Section 106 and State 6E reviews are incomplete, inappropriate, and inconsistent with relevant law and regulation." Similarly, the

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Hawai'i Supreme Court concluded that "the SHPD failed to comply with HRS chapter 6E and its implementing rules when it concurred in the rail project prior to the completion of the required archaeological inventory survey for the entire project." *Kaleikini v. Yoshioka*, 128 Hawai'i at 57. The court ruled that SHPD ignored the plain meaning of SHPD's own rules. The Intermediate Court of Appeals has also ruled that "SHPD violated its rules by failing to require the completion of an AIS, part of the first sequential step, before continuing in the review process. This was a critical error because the preparation of an AIS was necessary for the SHPD to properly identify and evaluate the significance of the historic properties present in the MPC Project area and to determine the impact of the MPC Project on significant historic properties before considering mitigation plans. By treating the AMP as a substitute for an AIS, the SHPD skipped the critical first step and other required sequential steps in the review process. The rules do not permit the SHPD to accept a monitoring plan as a substitute for an AIS. Monitoring plans are directed at the mitigation step of the review process. See HRS § 6E-2 (defining "[m]itigation plan" to include monitoring plans). Indeed, the AMP submitted by Kawaiaha'o Church described the proposed monitoring program as a "mitigation measure." One of the central purposes of the historic preservation law 'is to require that the effects on historic properties be reviewed prior to the approval of a project.' *Kaleikini*, 128 Hawai'i at 70, 283 P.3d at 77. By accepting the AMP as a substitute for an AIS, the SHPD skipped to the mitigation step of the review process and allowed construction on the MPC Project to commence, without identifying the significant historic properties at issue and evaluating the impact of the MPC Project on them, thereby limiting the potential options for their protection and preservation." *Hall v. Dep't of Land & Natural Res.*, 128 Hawai'i 455, 469-470 (Haw. Ct. App. 2012).

Given SHPD's track record, does the State Senate really want to give SHPD even more discretion and does it feel comfortable putting even more iwi at risk?

Some people have incorrectly claimed that this bill makes state law consistent with federal law. It does not.

While section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f allows certain projects to be phased in limited circumstances (*see* 36 CFR 800.4(b)(2)), a separate federal law, section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c) does **not** allow highway projects to commence until after all archaeological work is completed. Numerous federal courts have required that the identification of historic properties, including sub-surface sites, be completed prior to the issuance of a record of decision pursuant to § 4(f) of the Department of Transportation Act. *N. Idaho Cmty. Action Network v. United States DOT*, 545 F.3d 1147, 1158-1159 (9th Cir. Idaho 2008); *Corridor H Alternatives, Inc. v. Slater*, 334 U.S. App. D.C. 240, 166 F.3d 368 (D.C. Cir. 1999); *Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis*, 701 F.2d 784, 788-89 (9th Cir. 1983); *Named Individual Members of the San Antonio Conservation Society v. The Texas Highway Department*, 446 F.2d 1013, 1023 (5<sup>th</sup> Cir. 1971).

Therefore, even if this bill were to pass, any highway project receiving federal funds that fails to complete archaeological work prior to approval and construction will be halted by a federal court.

Furthermore, section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, requires that agencies make “a **reasonable and good faith effort** to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.” 36 CFR § 800.4(b)(1). No such requirement is found in SB 1171 HD1. In addition, unlike federal law, SB 1171 HD1 allows archaeological work to be postponed when construction is performed in stages – as virtually all constructions projects are.

SB 1171 HD1 is inconsistent with federal law. More importantly, it would allow projects to be approved and constructed before decisionmakers have been given facts that are critical to informed decisionmaking. Does the House Finance Committee want the executive branch to make uninformed decisions?